IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.238 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SHANKARLAL KESHAVLAL - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR BS SUPEHIA for Appellant.
MR KT DAVE, APP for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 15/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (“the Code” for short) is

directed against judgment dated January 19, 2001 rendered by the learned Additional Sessions Judge, Court No.13, Ahmedabad City, in Sessions Case No.259 of 1998 by which the appellant is convicted for commission of offence punishable under Section 376 of the Indian Penal Code (“IPC” for short) and sentenced to R.I. for nine years and fine of Rs.5,000=00, in default S.I. for nine months. The learned Judge has further directed that a sum of Rs.4,000=00 from the amount of fine, if any paid, be given to the prosecutrix by way of compensation to her as contemplated by Section 357 of the Code.

2. In view of law laid down in **Bhupinder Sharma vs. State of Himachal Pradesh, (2003) 8 SCC 551,** the name of the victim is not indicated in this judgment.

3. The facts emerging from the record of the case are as under:

Complainant Hasmukhbhai Popatbhai Sathwara is residing in *Bharwadvas,* Mahadevpura, Vatva, Ahmedabad, with his family. He has five daughters. The victim is the eldest. The birth date of the victim is September 8, 1984. One Mukesh Keshubhai Patel came to reside in

neighbourhood of the victim. On February 8, 1998, complainant Hasmukhbhai left his house at 8.00 A.M. to do labour work at Ghodasar leaving all his five daughters at his house. When he returned home at about 7.00 P.M., he was informed by his daughter Neeta that Mukesh enticed minor victim, out of keeping of her lawful guardian with intent that she might be compelled or forced or seduced to illicit intercourse, by informing her that her father had fallen down while doing labour work and was admitted in the hospital for treatment. Neeta also informed Hasmukhbhai that thereafter the victim had not returned. Hasmukhbhai made search about the victim at the places of his relatives and friends. He also made inquiries about his missing daughter and Mukesh with Keshubhai Chhaganlal Patel, who is father of Mukesh. Extensive search made by Hasmukhbhai about his missing daughter did not yield any result. Therefore, as a matter of last resort, he lodged complaint with Police on February 17, 1998. After enticing the victim, Mukesh took her to Geeta Mandir and from there to Junagadh in a bus. At Junagadh, the victim and Mukesh stayed at Sunil Guest House. The case of the prosecutrix is that Mukesh committed forcible rape on her at the said guest house. On the next day, Mukesh moved with the victim in Junagadh and stayed at another guest

house, which was near S.T. Stand, where he again committed rape on the victim. Thereafter, the victim was brought by Mukesh to Rajkot in a train. From Rajkot, Mukesh took the victim to Maninagar, Ahmedabad, and stayed for some few hours in the temple of Lord Mahadev situated at Ghodasar. Mukesh asked the victim to reach Maninagar Railway Station and went to see some of his acquaintances. At Maninagar Railway Station, Mukesh informed the victim that her father has lodged a complaint against him as a result of which, his father was arrested and, therefore, she should come with him at Baroda. So saying, the appellant took the victim to Baroda. From Baroda Railway Station, the victim and Mukesh went to Bajva. At Bajva, Mukesh and the victim met the appellant. Since Mukesh and the victim had no place of abode, the appellant lured them to his house on the pretext of giving shelter and employment to Mukesh. The appellant took Mukesh and the victim to his house situated at Barbulnagar, Vadodara, where Mukesh and the victim stayed for a week with the appellant in his house. Mukesh used to leave the house in the morning for doing masonry work. During the night time, Mukesh was sleeping in the *oshri* of the house whereas the victim was sleeping inside the room along with the appellant and the wife of

the appellant. It may be stated that at Bajva, Mukesh had introduced the victim as his sister to the appellant. At the house of the appellant, the appellant noticed that Mukesh was jesting with the victim and on interrogation of the victim, he learnt that both of them had eloped together from Ahmedabad. Realizing that minor victim girl was all alone and was not protected by anyone, the appellant had started making advances at her. After two days of bringing of Mukesh and the victim to his house, the appellant during the night time started misbehaving with the victim. However, the victim shouted and protested as a result of which, the appellant had to stage retreat. However, on the same night after some few hours of the earlier incident, the appellant untied the string of *pyjama* put on by the victim, and before any protest could be raised by the victim, pressed her mouth with his hand. Thereafter, the appellant had committed forcible rape on the victim. After the rape was over, the victim shouted for help as a result of which, wife of the appellant, who was sleeping in the said room, woke up. She got angry with the appellant and asked the appellant as to why he was making the girl cry. Thereupon, the appellant had promised his wife that he would not repeat his act again. It is relevant to notice that

marriage of the appellant with his wife was arranged by one Anandiben staying at Santoshnagar. The appellant took the victim to the house of Anandiben situated at Santoshnagar and made an attempt to sell off the victim. During this time, the appellant had made the victim to sit in the house of Anandiben. Mukesh anyhow came to know about this. Therefore, he in the company of others went to the house of Anandiben. On seeing Mukesh with people coming to the house of Anandiben, the appellant had made his escape good. Mukesh and people, who had accompanied him, brought the victim to Barbulnagar and assured the victim that they would thrash the appellant. It may be stated that after fleeing from the house of Anandiben situated at Santoshnagar, the appellant went to his house at Barbulnagar. Meanwhile, Pushpaben, who is wife of the appellant, learnt about the rape on the victim by the appellant, i.e. her husband, and the attempt made by the victim to sell off her as a result of which, the appellant fled from Barbulnagar also. The incident which had happened at the house of Anandiben was reported to Jawaharnagar Police Station, Vadodara. The policeman from Jawaharnagar Police Station met the victim and learnt that she was staying with the appellant at his house. Therefore, a message was sent by PSO of Jawaharnagar

Police Station, Vadodara, to City Police Station, Ahmedabad, that the victim was found staying with the appellant at Baroda. Thereupon, the victim was brought by Ahmedabad City Police to Ahmedabad. The victim narrated the whole incident to his father, who lodged the complaint with the Police against the appellant and Mukesh for commission of rape on his daughter. During the course of investigation of the said complaint, the victim was subjected to medical check-up. Her clothes were seized under a panchnama to be forwarded to Forensic Science Laboratory for analysis. The complaint of Hasmukhbhaiwas investigated by Police Inspector Mr.D.D.Damor. Mr.Damor recorded statements of those persons, who were found to be conversant with the facts of the case. The appellant was arrested and his clothes were also seized under a panchnama. The articles which were seized during the investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, the case against Mukesh was separated as he was found to be juvenile whereas the appellant was chargesheeted in the Court of learned Metropolitan Magistrate, Ahmedabad. As the offence punishable under Section 376 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court,

Ahmedabad City, for trial where it was numbered as Sessions Case No.259 of 1998.

3. The learned Additional Sessions Judge, Ahmedabad City, to whom the case was made over for trial, framed necessary charge against the appellant at Exh.2 for commission of offences punishable under Sections 376, 363 read with Section 114 and Section 365 IPC. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) father of the victim and complainant, i.e. Hasmukhbhai Popatbhai Sathwara as P.W.-1 at Exh.7; (2) victim as P.W.-2 at Exh.50; (3) Narsinhbhai Govindbhai Baraiya as P.W.-3 at Exh.51; (4) Dr.Nareshbhai Kalabhai Patel, who was Superintendent of Vaccination and Registrar of Deaths & Births, as P.W.-4 at Exh.54; (5)Dr.Deepakkumar Champaklal Jagani as P.W.-5 at Exh.56; (6) Investigating Officer PI Mr.Daljibhai Dharmaji Damor as P.W.-6 at Exh.62; and, (7) PSI Mithabhai Kalidas Parmar, who had registered complaint of Hasmukhbhai, as P.W.-7 at Exh.69, to prove its case against the appellant. The prosecution also produced documentary evidence such as; birth certificate of the prosecutrix indicating that her birth date was September

8, 1984 at Exh.55; certificate issued by Dr.Jagani after examining the victim at Exh.58; certificate issued by Dr.Jagani after examining the appellant at Exh.60; panchnama indicating seizure of the clothes put on by the victim on the day of incident at Exh.63; panchnama indicating seizure of clothes put on by Mukesh at Exh.64; panchnama indicating that vaginal swab, pubic hair, etc. of the victim were taken at Exh.65; report of analysis at Exh.68; complaint of Hasmukhbhai at Exh.70; panchnama of place where the victim was subjected to rape at Exh.72; control *verdhi* sent by PSO, Jawaharnagar Police Station, Vadodara City, to Ahmedabad City Police that victim was found at Exh.73, etc. in support of its case.

4. After recording of evidence of the prosecution witnesses was over, the learned Judge of the trial Court explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further as required by Section 313 of the Code. In his further statement, the appellant claimed *alibi.* The appellant stated, *inter alia,* in his further statement that when he was crossing Railway Track, Mukesh had met him and informed him that he and the victim were

hungry since two days as a result of which, he had given Rs.10.00 to the victim. According to the appellant, thereafter, Mukesh had requested him to employ him somewhere and he had introduced Mukesh to a contractor who was engaged in business of painting houses. The appellant claimed that Mukesh and the victim had no arrangement to stay and, therefore, he had let out one of the four rooms belonging to him to Mukesh by charging Rs.200=00 per month as rent. The appellant stated that it was his liability to provide light, water, etc. to Mukesh and the victim, but as Mukesh had no money with him, his wife made arrangements for dining for Mukesh and the victim for a week, and Mukesh had promised to return the amount after earning. According to the appellant, Mukesh was not doing any work, but was sitting with Ranjeetbhai, who was selling liquor. The appellant claimed that Ranjeetbhai and Naginbhai were bent upon getting his house for a song and, therefore, Ranjeet bribed the Police and persuaded the victim to lodge a false complaint against him as a result of which, a false case was foisted upon him. Though the appellant took the stand as mentioned above in his further statement, he did not lead any evidence in support of his claim.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution that on the day of incident, the age of the prosecutrix was 13½ years, i.e. below 16 years. The learned Judge considered the examination-in-chief and cross-examination of the victim minutely and found that her testimony was free from blemish as well as trustworthy and, therefore, it was prudent to act upon her testimony. After placing reliance on the testimony of the prosecutrix, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant had subjected the victim to rape. In view of abovereferredto conclusions, the learned Judge has acquitted the appellant for commission of offences punishable under Sections 363 read with 114 IPC and Section 365 IPC, but convicted him under Section 376 IPC and imposed sentence referred to above vide judgment dated January 19, 2001, giving rise to instant appeal.

6. Mr.B.S.Supehia, learned counsel of the appellant, contended that the case of rape on her, as narrated by the victim, is improbable and, therefore, judgment impugned in the appeal should be set aside. The learned counsel of the appellant referred to the

testimony of the victim wherein it is stated by her that on the day of incident the wife of the appellant was also sleeping in the room in which the rape was committed on her and contended that if the wife of the appellant was sleeping in the room, it was not probable that the appellant would commit rape on the victim and, therefore, the appellant should not have been convicted for commission of rape on the victim. It was argued that a man would not commit rape on a girl in presence of his wife and, therefore, the case, which is narrated by the victim, is not probable and the conviction of the appellant under Section 376 IPC should be set aside. The learned counsel referred to the history of assault narrated by the victim before Dr.Jagani wherein it is mentioned by her that Mukesh and the appellant both had intercourse with her for a week and contended that this fact is not stated by the victim in her testimony before the Court and in view of material discrepancies appearing in the testimony of prosecutrix, the case of the prosecution should be disbelieved. It was pleaded that before the doctor, who examined the appellant, the appellant stated that he had made an attempt to rape the victim, which was thwarted by his wife and, therefore, in view of frank admission made by the appellant before the

doctor, the prosecution case that the appellant had raped the victim should have been disbelieved by the learned Judge of the trial Court. It was claimed that while keeping a hand pressed on the mouth of the victim, it was neither possible for the appellant to remove clothes of the victim nor possible to remove his clothes and, therefore, the case, which was not probable at all, should not have been believed by the learned Judge of the trial Court. The learned counsel asserted that the evidence on record has not been appreciated in its true perspective by the learned Judge of the trial Court and, therefore, the appeal should be allowed.

7. Mr.K.T.Dave, learned Additional Public Prosecutor for the State, pointed out to the Court that while tendering the evidence before the learned Judge of the trial Court, the victim was subjected to such a gruelling cross-examination that she had to weep and made statement before the Court if rape on her had not been committed by the appellant, she would not have so stated before the Court and asserted that this fact itself shows that the testimony of the victim is without blemish and is rightly acted upon by the learned Judge of the trial Court. According to the learned Additional Public

Prosecutor for the State, conviction in a rape case can be based solely relying upon the testimony of the prosecutrix and corroboration is not a *sine qua non* for recording conviction under Section 376 IPC if testimony of the victim is found to be cogent and trustworthy. The learned counsel of the State Government referred to testimony of the victim in detail and argued that the defence has failed to bring on record major contradictions and/or omissions with reference to earlier police statement of the victim and, therefore, her testimony should be believed by this Court also. After emphasizing that corroboration to testimony of a victim of a rape is not necessity of law, it was argued that here in this case, corroboration was available to the testimony of the victim in abundance and, therefore, well founded conviction of the appellant under Section 376 IPC should be upheld by this Court. It was argued that the incident in question of rape on victim was narrated by a victim of tender age to her father, who had lodged the complaint promptly and, therefore, testimony of the victim deserves acceptance. It was claimed that the testimony of the victim also gets corroboration from the history recorded by the doctor, who had medically examined her and, therefore also, her testimony deserves

to be accepted. The learned counsel of the respondent maintained that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 376 IPC and as the learned counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Mr.B.S.Supehia, learned counsel of the appellant, and Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. This Court is dealing with a rape case and, therefore, it would be relevant to notice, in brief, the law laid down by the Supreme Court regarding appreciation of evidence of a prosecutrix. In **State of Punjab Vs. Gurmit Singh, A.I.R. 1996 SC 1393**, following principles have been laid down for appreciation of evidence tendered by a prosecutrix:

"The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon

corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable, Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a Victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity least that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

Having noticed the principles, which must be

borne in mind by a Court of law while appreciating the evidence of a prosecutrix, this Court proposes to consider the evidence of the prosecutrix tendered in the case on hand.

11. The prosecutrix in this case is examined as P.W.-2 at Exh.50. She has stated in her testimony that she is residing in a building of Bijalbhai Bharwad situated in Bharwadvas, Mahadevpura, Vatva, Ahmedabad, with his parents and four sisters. She has stated that the name of her mother is Ramilaben and that her parents are doing masonry work. The witness has mentioned that she is the eldest daughter of her parents and she has studied up to 8th Standard. According to her, one Keshubhai Chhaganbhai Patel with his family including his son Mukesh had come to reside near her house. The witness has mentioned that the incident in question took place on February 8, 1998 and one month prior thereto, she had come in contact of Mukesh. According to the victim, on February 8, 1998, her parents had gone to attend masonry work and that when she was in her house with her sisters, Mukesh had approached her between 2.30 A.M. and 3.00 P.M. and informed her that she was called by her parent. The witness has mentioned that thereupon, she had left her house with Mukesh and that Mukesh had taken her to

Isanpur from where she was taken to Junagadh. According to her, at Junagadh, she had stayed with Mukesh at Sunil Guest House where Mukesh had committed forcible rape on her. The witness has also mentioned that Mukesh had moved in Junagadh in her company and during the night time, they stayed in another guest house situated near S.T. Station. The witness has stated that in the second guest house, she was subjected to rape by Mukesh. What is mentioned by the victim is that thereafter she was brought to Rajkot in train and from Rajkot, she was brought to Maninagar. According to the victim, at Maninagar, she had stayed for some hours in the temple of Lord Mahadev situated at Ghodasar. The victim has mentioned that Mukesh had asked her to come to Maninagar Railway Station and left the temple to see his acquaintances. According to the victim, Mukesh had informed her at Maninagar Railway Station that a complaint was lodged against him by her father and so saying, she was taken to Baroda. It is mentioned by the victim that from Baroda, she in the company of Mukesh had gone to Bajva where they had met the appellant. According to her, the appellant had taken her and Mukesh to his house and got employed Mukesh as mason. The victim has claimed that during the night time, Mukesh was sleeping in the *oshri* of the house whereas she was sleeping inside

the room along with the appellant and his wife Pushpa. The victim has stated that it was learnt by the appellant that she was hapless girl and, therefore, the appellant had stated making advances at her. According to the victim, during the night time, the appellant had tried to misbehave with her as a result of which, she had raised shouts and the appellant had to stage a retreat. The victim has further stated that after few hours of the first attempt, the appellant had untied string of her trousers and pressed her mouth so as to prevent her from shouting and thereafter committed rape on her. The victim had asserted before the Court that after commission of rape was over, she had raised shouts as a result of which, the wife of the appellant, who was sleeping in the same room, had waken up and scolded the appellant, whereupon the appellant had assured that he would not repeat the same. The victim has asserted before the Court that thereafter, the appellant had taken her to the house of Anandiben situated at Santoshnagar and made her to sit in the house of Anandiben. According to the victim, thereafter, the appellant had made an attempt to sell off her. What is asserted by the victim is that meanwhile Mukesh had learnt about this fact and, therefore, Mukesh in the company of other people had come to the house of Anandiben situated at Santoshnagar. The victim has

mentioned that on seeing Mukesh with other people coming towards the house of Anandiben, the appellant fled away. The victim has stated that thereafter she was brought to Barbulnagar and before that the wife of the appellant had come to know that the appellant had subjected her to rape and attempted to sell off her as a result of which, the appellant had fled his house also. The victim has thereafter mentioned that she was brought to Ahmedabad by the Police where she had narrated the incident to her father on the basis of which, her father had lodged the complaint.

11.1 Cross-examination of the victim reveals that several embarrassing questions were put to her regarding her relations with Mukesh. The trial Court was not determining the guilt of Mukesh or otherwise and, therefore, this Court feels that those questions could not have been permitted to be put to the victim so as to embarrass her. Be that as it may, during the cross-examination, the victim broke down and while weeping narrated before the Court that if any act had not been committed by the appellant, she would not have named the appellant as perpetrator of crime. What is relevant to notice is that in her cross-examination, the claim made by the victim that after rape was committed on her by the

appellant, the appellant had taken her to house of Anandiben situated at Santoshnagar and the appellant had made an attempt to sell off her and that on seeing Mukesh coming with people towards the house of Anandiben, the appellant fled the house of Anandiben, is not challenged at all. The suggestion made by the defence that a false case was foisted upon the appellant is emphatically denied by the claimant.

11.2 On reappreciation of evidence of prosecutrix, this Court finds that at the time of incident, she was of tender age. Before the incident, she had no occasion to meet the appellant. It may be that she had eloped with Mukesh, who had taken her to Baroda. However, she was not knowing the appellant at all before she was taken to Baroda by Mukesh. The defence could not even remotely suggest that she was on inimical terms with the appellant and, therefore, she was out to implicate him falsely in such a serious case. The victim has narrated the incident of rape on her in a most natural manner without making any noticeable embellishment or improvement. The defence could not bring on record major contradictions and/or omissions in the testimony of the victim with reference to her earlier police statement. Therefore, her testimony is found to be cogent and reliable. It is necessary to

remember that the case of the appellant is that of *alibi.* However, the appellant could not lead any evidence to probabilize his defence as required by Section 113 of the Indian Evidence Act, 1872. A little girl, who at the time of incident was hardly of 13½ years of age, would not state before the Court of law after attaining age of 16 years that she was subjected to rape because this is bound to bring her shame and disrepute marring her future chance of getting a good match as her life partner. Nothing could be brought on record to impeach credibility of the victim. Merely because she claimed before the doctor, who had examined her, that rape was committed on her for a week by the appellant and Mukesh at the house of the appellant, one need not jump to a conclusion that material improvements were made by the victim in her testimony before the Court. What is mentioned by the victim is that the appellant had subjected her to forcible sexual intercourse as well as she had also sexual intercourse with Mukesh. The history narrated by the victim before the doctor, who examined her, does not destroy or affect her claim before the Court that she was subjected to forcible rape by the appellant.

12. The plea that it is not probable that a man would commit rape on a little girl in presence of his

wife and, therefore, the judgment impugned in the appeal should be set aside, is devoid of merits. It is claimed by the victim that on the night of incident, the appellant had tried to misbehave with her as a result of which, she had raised shouts and thereupon, the wife of the appellant had woken up, who had scolded the appellant. This part of the testimony of the victim is not challenged at all. On the contrary, this Court finds that while narrating the history before the doctor, who examined the appellant after his arrest, it was stated by the appellant that he had made an attempt to rape the victim. Thus, this Court finds that the claim of the victim that an attempt was made to molest her and that the appellant had to beat a retreat, stands completely corroborated by the history narrated by the appellant himself before the doctor. It is relevant to notice that the appellant had made such an attempt though his wife was physically present in the room and sleeping. One who has audacity to molest a girl and made an attempt to rape a girl in presence of his wife, would not miss the opportunity to rape the girl if available. The victim has narrated that before committing rape on her, string of her *pyjama* was untied and thereafter, her mouth was pressed as a result of which, it was not possible for her to resist or raise shouts. This claim of the victim

deserves acceptance because on the first occasion, when attempt to commit rape was made, the victim had raised shouts and thwarted the attempt to commit rape on her successfully. In the light of these circumstances, the claim of the victim that she was subjected to rape by the appellant will have to be viewed. Viewed in the light of the circumstances brought on record by the prosecution, this Court is of the opinion that the story of rape on her by the appellant as narrated by the victim is not probable at all and cannot be disbelieved on the ground that it is not possible for a man to rape a girl in presence of his wife, who was also sleeping in the room in which the rape was committed.

13. The contention that in view of the history narrated by the appellant himself before the doctor that he had made an attempt to rape the victim, the conviction of the appellant recorded under Section 376 IPC should be converted into one under Section 511 read with Section 376 IPC, is devoid of merits and cannot be accepted. Once the claim of the victim is accepted that she was subjected to rape by the appellant, there is no question of converting the conviction of the appellant to one punishable under Section 511 read with Section 376 IPC. It is relevant to notice that by narrating the history

before the doctor, an attempt was made by the appellant to exonerate himself. However, as discussed above, this Court finds that the testimony of the victim is not only trustworthy and cogent but inspires confidence of this Court as it had inspired the confidence of the trial Court. On the facts and in the circumstances of the case, this Court finds that offence punishable under Section 376 IPC is firmly established by the prosecution and no case is made out by the learned counsel of the appellant to interfere with the same in instant appeal. Therefore, the appeal, which lacks merits, deserves dismissal.

For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the trial Court in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra*